No. 90-1793

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AVON GROUP INC.,

Petitioner,

vs.

STATE OF NEW YORK INSURANCE DEPARTMENT
and WENDY E. COOPER,
ACTING SUPERINTENDENT OF INSURANCE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS

1. In an Admiralty cause for declaratory judgment to declare certain policies of insurance ocean marine, is the District Court constitutionally mandated to hear and decide the cause.

2. Should not the Court determine whether a policy of insurance is ocean marine, based upon the intent of the underwriter, the insured, the broker and the terms of the policy.

3. Where Admiralty jurisdiction is invoked, should not Constitutional Supremacy supersede the Tax Injunction Act.

4. Did the District Court's err in failing to consider at a full hearing regarding the applicability of the Tax

Injunction Act the following crucial factor's (1) error of the State tax (2) the State reversal of the tax (3) the effect on Admiralty and Maritime Law and (4) the effect on foreign commerce.

5. Did the exlusion of ocean marine insurance from the New York State Insurance Law compel the District Court to apply common law, conflict of law and comity doctrines prior to a ruling on respondent's motion.

6. Should not the District Court in ruling on the Application of the Tax Injunction Act, be guided by the decisional law pursuant to the Eleventh Amendment.

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INTRODUCTION

This application for review revolves around the issue of Federal jurisdiction over international maritime law, and whether or not the State of New York has the right to encroach on this historically exclusive and unique domain by way of its taxing power. Petitioner, Avon Group,Inc. ('Avon') argues that should the several states have exclusive jurisdiction over certain admiralty matters because of the application of the Tax Injunction Act, 28 U.S. C. 1341, then the uniformity and national harmony in the application of admiralty matters nationwide will be interfered with. This matter is, Avon believes, new to this Honorable Court and is of immense importance to the world of international marine underwriters.

For if ocean marine policies of insurance are subject to tax and regulation by the States, as the State of New York herein contends, then such policies become difficult, uncertain and hazardous to write. This is the subject of this case and this overview is an introduction to a question of federal law. Avon's brief gives a detailed account of the case and is attached hereto.

In brief, the State of New York, through the taxing provisions of its Insurance Department, has recently made attempts to levy its tax on international marine policies of insurance. The Department asserts its taxing power over the whole policy on the ground that premiums on policies of shore-bound cargo are therefore subject to insurance taxation.

In November, 1988, Avon, an insurance broker in Manhattan, was put on notice of the Department's tax assessment for the years 1984 to 1987 on certain ocean marine policies written through its office. The department takes the position that since the insured cargos landed ashore within the State, that the policies are characterized as 'inland marine', and subject to tax. Since ocean marine insurance has historically been cognizable in admiralty, a petition was filed in the U.S. District Court, Southern District of New York. Avon asked for a Declaratory Judgment, seeking a ruling that the policies were ocean marine, not inland marine. The New York State Insurance Department makes no attempt to tax ocean marine policies, which are specifically excluded from its taxing powers.

Avon chose to seek a Declaratory Judgment in the Federal District Court. The insurance industry as a whole would benefit from a dispositive ruling from the Federal Courts that applies in all of the several States, not just New York.

The District Court dismissed the case on the grounds of the Tax Injunction Act, 28 USC 1341. Avon therefore was never heard on its primary argument, which was whether or not the tax applied at all and whether the policies taxed were ocean marine. The Tax Injunction Act was improperly applied. Avon was directed to exhaust its remedies within the State's Court system.

This petition is directed at the question of the United States District Court's dismissal, which precluded Avon's

admiralty case from being decided in an admiralty court. It is respectfully requested that this case be remanded back to the District Court for a hearing on the admiralty issue alone.

Avon's objection to the Court ruling does not end at the question posed by the complaint that the several policies are ocean, but specifically raises the issue of the failure of the District Court to consider at a full hearing the application of the Tax Injunction Act. The issues that should have been considered are: (1) the error of the State tax, (2) the State's later reversal of the State tax and (3) the effect on Admiralty and Maritime Law and (4) the effect on foreign commerce. Additionally, Avon urges that in matters of Admiralty, factors such as the similar legal application of the Eleventh

Amendment as well as Conflict of Laws and Comity Doctrines must be borne in mind before a dismissal can be reached. A proper ruling by the District Court must encompass the above factual and legal factors which would have compelled the District Court to deny respondent's motion to dismiss the complaint.

ERRORS OF DISTRICT COURT

Errors of the District Court which are the basis of this appeal are that the Court stressed 1) that petitioner was an Excess Line Broker when in fact he was not acting as one, 2) that Avon sought injunctive relief which was incorrect, 3) and that coverage was crucial to the District Courts decision rather than the fact that the total policy was ocean marine. Moreover the District Court was remiss as it failed

to hear and decide the principal question, was Admiralty jurisdiction present and thus erroneously concluded that the Tax Injunction Act applied.

District Court correctly noted:

Petitioner "places a type of insurance called "ocean marine Cargo Transit Insurance in the London market' which statement on its own requires a denial of respondent's motion.

STATEMENT

This is an action filed by a licensed New York State insurance broker in the United States District Court for the Southern District of New York sounding in Admiralty and Maritime law for a declaratory judgment adjudging certain

policies of insurance ocean marine. On respondent's motion pursuant to F.R.C.P. 12(b)(1), the amended complaint was dismissed by the District Court without prejudice to petitioner's commencement of an action in the appropriate Court of the State of New York on the ground that the Tax Injunction Act barred the District Court's jurisdiction. Both motions for reconsideration and reargument were denied. The decision of the District Court was affirmed by United States Court of Appeals for the Second Circuit and Petitioner's Petition for Rehearing was denied. Petitioner files this Writ of Certiorari.

Petitioner urges that the policies are ocean marine and accordingly are exempt from taxation by virtue of § 2105 and § 2117 of the "Insurance Law". Nor was petitioner obligated to furnish affidavits,

under § 2118 of "Insurance Law", again by reason of the exemption of §2105 and § 2117. The District Court dismissed the amended complaint and entered judgment without prejudice to petitioner commencing an action in the New York State Courts on the ground that the Tax Injunction Act applied, barring the District Court's jurisdiction. On Appeal the Circuit Court affirmed stating that they were in substantial agreement with the District Court and denied the Petition for a Rehearing.

FACTS

The policies at bar are written by Lloyd's of London (referred to as Lloyd's) and the Institute of London Underwriters (referred to as ILU) and are titled marine, including all necessary ocean marine terms,

coverage in transit by any conveyance anywhere in the world and at any location of any description anywhere in the world. Insurance is against "All Risk". Annexed to the policies are the marine Institute Cargo Clauses. The polices being written by the marine Underwriters at Lloyd's and the ILU, necessitates the exclusive use of an ocean marine form, the only form available for this coverage. Incorporated therein are policy terms subject to English Law and Practice. This form of policy has always been written in the marine market and there may be thousands of policies written in the American market today. Some of them are labeled stock through-put policies adaptable to all and every kind of ocean marine cargo, and are certainly not confined to the fur Industry as respondent would have the court believe.

This declaratory judgment action is prosecuted on the ground that these ocean marine Insurance policies are exempted from the "Insurance Law" § 2118 and respondent's Circular letter 21, as well as all the statutory regulatory rules of respondent and the "Insurance Law". Neither respondent's answer as well as its motion nor respondent's letter of November 15th give insight as to why respondent believes that the policies are not ocean or for that matter why the policies are inland though respondents admits that ocean marine Insurance is exempt from the "Insurance Law".

This case arose as the result of one insurance broker complaining to respondent that petitioner had failed to collect taxes on policies, that in the complainant's mind petitioner was in breach of the "Insurance

Law" rather than that complainant incompetently analyzed the nature of the said policies. The respondent attacks petitioner regarding some seventy five policies and ignores the other thousands on the market. Respondent made no attempt to investigate the insurance market regarding the nature of these ocean marine Cargo/Stock through-put policies in relationship to the scope and the extent to which they are written- this may be the most prevalent form of insurance written in the marine market today.

Petitioner's case on this motion to dismiss consists of an offer of the amended complaint, respondent's answer and their responses to the interrogatories propounded by petitioner. Petitioner's prima facie case is that the policies at issue are ocean marine. The policies at issue are

well within the contemplation of the "Insurance Law'" that outlines and defines ocean marine. In fact respondent leaves the definition of ocean marine to the ocean marine underwriters by stating that ocean marine is that which is commonly referred to as ocean marine. The respondent reaffirmed this definition when asked in the interrogatories what this meant by saying it is that which is determined by custom of the industry. How can the Court rule on this motion without a finding on this issue ie. what is the custom in the industry as to what is an ocean marine Policy?

THE POLICY

The insurance policy terms as stated above in our brief and attached to the complaint are marine Cargo Insurance

policies insuring against all risks, worldwide, titled marine, issued by the marine underwriters of Lloyd's and ILU providing complete and total insurance coverage of the assured's goods while in transit anywhere in the world to anywhere in the world, via any route or routes, direct or including transshipment, including whilst at any location of any description anywhere in the world including but not limited to during manufacture and/or change of specie, and or in storage or elsewhere wherever the goods are located.

Underwriters are made aware of the locale of cargo when a claim is made for loss or damage, and not until then.

The paramount consideration to be given in determining whether a policy is ocean marine insurance is the intent of the

underwriter. The policy on its face has all the necessary facts to cause the Court to conclude that the policy was written by underwriter's pen as ocean marine insurance.

Our argument encompasses the law of England , United States and New York State all of which conclusively establish the fact that the instant policies are ocean marine Insurance. The Marine Insurance Act of 1906 (A codification of marine common law) and the decisional law of Admiralty regarding marine insurance law of both the the United States and England provide the common law basis for the legal effect given by Petitioner to the policy of insurance. Clearly the decisional case law of the State of New York supports petitioner's contention that the policies are ocean marine.

In Parks, The Law and Practice of marine Insurance , Vol 1 pg. 15, the author discusses the law of England and the Act of 1906, as it constitutes the "Rule in Great Britain and the Commonwealth Nations".

The New York State Insurance Department does not provide any rules and regulations governing ocean marine policies, nor is the New York State Law like English law made subject to the policies by contract incorporation. In fact, the respondent states that ocean marine insurance is controlled by the "Custom of the Trade" and better stated, by the underwriter's pen. The standard set in the "Insurance Law " §1113 (20D) defining ocean marine Insurance as that which is 'commonly' insured thereunder is more fully

described by respondents as "Custom of the Trade".

Admiralty insurance law (whether in England, America or New York) is predicated on the tenets and principles that are characteristic of ocean marine insurance and alien to Inland Insurance: i.e.

Average/Coinsurance
Indemnity Policy
Uberrima Fides
Strict Warranty Rule
General Average
Average (Particular or General)
Institute Cargo Insurance Clauses.

The application of these tenets and principles will have serious effect on an assured's ability to recovery for loss under the policy, and their existence

should cause the Court to take caution not to interfere with voluntarily agreed upon contractual commitments of the parties.

NEW YORK INSURANCE LAW

Pertinent sections of the "Insurance Law'.

§2105 Excess Line Broker Licensing
Sub (a) exempt ocean marine Insurance

§2117 Prohibition from aiding Unlicensed or Unauthorized Insurance

§2118 Duties of Excess Line brokers

Circular Letter 21 is respondent's taxing rule regarding the application of § 2118.

§2105 and §2117 control section § 2118 Exempting ocean marine

The above statues and regulations are determinate provisions with respect to this case. Since respondent agrees that ocean marine insurance is exempt from tax, how can they seek relief under the Tax Injunction Act.

THE DISPUTE

This dispute results from a letter of respondent dated November 15th,1988 which letter was addressed to Petitioner:

> "Dear Mr. Colmant:
>
> This Department's investigation of placements made through Avon Group, Inc. with Lloyd's of London for various furriers, has been completed. It is determined that the coverage afforded falls under the definition of inland marine and therefore, the policy could be placed only pursuant to an excess line broker's license. Accordingly, affidavits should have been submitted and the tax was due on the entire premiums."

Respondent's conclusion is that the policies at issue are inland and that petitioner failed to submit affidavits and collect taxes and therefore petitioner was charged for uncollected taxes, interest and fines. The application of § 2118 of "The Insurance Law" results from the ruling that the policies are inland with all the flowing consequences.

The District Court Judge in his opinion stated that petitioner places a type of insurance called " ocean marine cargo transit insurance" in the London market" a finding which should have disposed of respondent's motion without further proceedings. It should have been both factually and statutorily obvious to the court that petitioner was not acting as an excess line broker and therefore had no

obligation under the Excess Lines section of the Insurance Law.

To summarize respondent's point concerning the controversy and dispute arising hereunder, it is respondent's conclusion that the policy is inland; this conclusion all without evidence, contra to petitioner's evidence that the policy was ocean marine. Petitioner sold what he got and knew what he sold to be an ocean marine insurance policy. Respondents are left without any legal or factual support to declare the policy inland, compelling the petitioner to seek relief by instituting the declaratory judgment proceedings.

Circular Letter 21 of respondent and § 2118 of "Insurance Law."

The Tax assessed against petitioner for failure to collect the premium is based

on the aforementioned Circular letter and "Insurance Law" §2118. Respondent's contention is the tax is as described and outlined in Circular letter 21 which test respondent accepts as the rule applied in this case. The heart of circular letter 21 is

> "Where a single policy covers exposure located both within and without the State of New York, the total premium is subject to the excess line tax."

Circular letter 21 was overturned and superseded by the New York State Legislature in activating and passing §9102 and subdivisions of the "Insurance Law" with appropriate subdivisions. The reach of the New York Tax is now limited to risks and property within the state based on an allocation of tax on premiums. The new tax rule seemingly meets the standard of this court quoted below with respect to inland

marine policies only. While the State Legislature made the new rule retroactive, Circular letter 21 is still operative in this case no matter how defective or incorrect it is as a tax base. Circular letter 21 in any event is not controlling since it's application does not pertain to ocean marine Insurance.

Petitioner states that the ruling of Circular letter 21 fails in face of Japan Line Ltd. v.County of Los Angeles 441 U.S. 434 (1979) as authority for this contention. The court states:

> "If the state tax 'is applied to an activity with a substantial nexus with the taxing State, *is fairly apportioned,* does not discriminate against interstate commerce and is fairly related to the services provided by the State,' no impermissible burden on interstate commerce will be found."
>
> pg. 444, 445.

The court's constitutional authority for its ruling is Article 1, Section 8, clause 3 of the United States Constitution which states:

> "(3) To regulate Commerce with foreign Nations, and among the several States".

The defect in circular letter 21 is clearly depicted by the Japan Line supra and respondent's tax is obviously outside the reach of this decisional law. Petitioner argues that no Court should pay heed to Circular Letter 21 as in fact, it is so obviously void that the application of the the Tax Injunction Act based thereon would be totally without merit.

ADMIRALTY AND MARITIME JURISDICTION

Article III Section (1) of the United States Constitution states:

> "Section 2 (1) The Judicial Power shall extend to all Cases, in Law and Equity arising under this Constitution, the Laws of United States.... to all Cases of admiralty and maritime jurisdiction..."

and from the The Federalist the explanation of the Constitutional section cited above:

> "The Fifth point will demand little animadversion. The most bigoted idolizer of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These are so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them, by the present Confederation, submitted to Federal Jurisdiction:"
>
> (pg 563)

Causes in Admiralty are cases within the Judicial Power of Article III Section 2 (1). Cases supporting this proposition are: Kossick v. United Fruit 365 US 731,739

(1961); Southern Pacific v. Jensen 244 US 205, 215(1917); Weindenlick v. Neitherlands Inc. Co. 125 F.S. 877, 879(S.D.N.Y. 1954). The Jurisdictional base of Admiralty law is the Constitution for the purpose of both harmony and uniformity of the national law. In Romero v. Ito 358 U.S. 354 (1959) the court states pg. 377, 378 of the courts opinion:

> "...Maritime law was federal based on a constitutional grant of jurisdiction. Thus maritime cases arose under thee Constitution of federal laws. By this mode of reasoning the words of the jurisdictional statute are found to 'fit like a glove'. Although it is true that the supremacy of federal maritime law over conflicting state law has recently been greatly extended, the federal nature of the maritime law administered in the federal courts has long been an accepted part of Admiralty jurisdiction.
>
> The classic statement of Mr. Justice Holmes in the The Western Maid, 257 U.S. 419, 432 summed up the accepted view that maritime law derived its force

> from ;the National Government and was part of the laws of the United States, and this was merely a restatement of a view which was clearly set forth in the The Lottawanna 21 Wall 558."

In the case of Knickerbocker v. Stewart, 253 U.S.149 (1919), the Supreme Court set forth the constitutional meaning of Admiralty and Maritime law..

> "The constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power by legislation or judicial decision to contravene the essential purposes of or to work material injury to characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the federal Government was the fundamental purpose, and to such definite end Congress was empowered to legislate within that sphere."

p. 160.

A proper pleading need only sound in Admiralty. Rule 9(h) F.R.C.P. states: 'If the claim is cognizable only in admiralty it is an admiralty or maritime claim.... whether so identified or not." and further stated in the case of Arkwright-Boston v. Bauer Dredging 1978 AMC208, 74 F.R.D.461(U.S.D.C. Texas 1977).

ADMIRALTY SUPREMACY

Both the Courts of the State of New York as well as the Federal Courts recognize the Admiralty Supremacy based on the need for national harmony and uniformity. The necessity for injunctive relief of application for restraint are not present. In the case at bar the Tax Injunction Act does not apply not only

because no injunction is necessary but primarily that no tax hinders the outcome of suit which is an interpretative dispute of whether the policy of insurance is ocean marine or Inland.

Article VI Section of the Constitution states:

> "(2) This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land: and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

In the Alverz v. American Export Lines Inc. 46 N.Y. 634 (1977) aff'd 446, U.S. 274 (1980) The New York Court of Appeals states:

> "...Were this a case in which state law were applicable notwithstanding

> the existence of a Federal question... we would be free to render a decision on such Federal question differing from pertinent Federal Court decisions save a controlling determination of the Supreme Court. To be distinguished, however those are unique areas, such as admiralty and maritime matters which either Constitution or Congressional legislation have been deemed to require a uniform body of national law. In such area not only does there exist a Federal question, but most importantly an answer obtainable solely by recourse to Federal Law. Thus, notwithstanding the absence of a controlling Supreme court decision were there uniform Federal rule, albeit one established by lower Federal court, we would be bound in a case such as the one at hand to apply it"
>
> pp. 638,639

The courts of New York as well as respondent are bound by the maritime decisions of the District Court.

The following cases are all cited in support of the doctrine of Admiralty supremacy. Romero v. Ito supra pg. 377, 378; Victory Carriers Inc v. Law 404 U.S.

202,204,205 (1977); The Armar, 1954 AMC 1674, 1684 1685 (Sup/NY 1954); Tibak v. City of New York (Sup. Ct. N.Y..1988) N.Y.L.J. September 20th 1988 pg. 18 Column 3; Parks, The Law and Practice of Marine Insurance vol. 1 pg 16 & 17.

OCEAN MARINE INSURANCE COGNIZABLE IN ADMIRALTY

The complaint is dedicated to the point that the policy res, sued on is an ocean marine insurance policy. A controversy involving an ocean marine insurance policy falls within the jurisdiction of admiralty, which now can be safely said to be "Hornbook Law".

The following cited cases support the above proposition: The New England Marine

Insurance Co. v. Dunham 11 Wall 1 (Sup Ct 1871): Arkwright v. Bauer 1978 AMC 208, 74 F.R.D 461 (U.S.D.C.- Texas); Weindorlick v. Netherlands Ins Co. 125 F. S. 877 (S.D.N.Y.); Kossick v. United Fruit, supra: Benedict on Admiralty Section 219 (7th Ed.)

PRIMA FACIE CASE

The complaint as amended spells out the basis for allegation that the policies at issue are ocean marine by their own terms as well as illustrated by the policies attached to the complaint. As the complaint was drawn to totally set forth the entire controversy , the District Court should have accepted the complaint as stated rather than improperly holding that the policy covered both inland and ocean coverage. The complaint without any

qualification alleges that the policies are ocean marine and no injunction was sought .

Respondent's answers are at the very least an admission of plaintiff's prima facie case. Respondent's answer paragraph 1, page 4 answers allegation 5 of the amended complaint. They are admission of the terms, conditions, coverage and intent of the policies, all establishing petitioner's allegation of ocean at the bare minimum.

Petitioner's case is established. Paragraph 1 on page 4 of the complaint states :

> "The insurance herein involved is termed: ocean marine Cargo Transit Insurance." the policy insured under the terms "All-Risk" & Conveyance by vessel and/or by air. Basically the cargo moved from Russia and Scandinavia, to Korea, Taiwan, the Dominican Republic & Greece with coverage stated to be worldwide. This

> worldwide concept encompasses movement to the United States and out of the United States, both by ocean and by Inland carrier and warehouse. Worldwide is by nature the requirement of the assured. Risks are mounted together to prevent failure of coverage. The plaintiff annexes sample polices and covers notes. These are attached as Exhibits 1 (a), 1 (b) and 1 (c) hereto."

Allegation 5 of the complaint states.":

> "This action concerns the placing of insurance in the London market, to wit either Underwriters at Lloyd's, London or member companies of the Institute of London Underwriters. The policy issued therein covered the transportation of the insured's cargo from origin to destination by ship and all other conveyances, and involves worldwide coverage to the individual insured."

Both allegations spell out the policy, the terms, coverage afforded and that the insured is the beneficiary of this extensive coverages which is without precedent.

Respondent's answer admits the policies as attached to the complaint. The respondent looks to the insurance industry for the standard and definition of what is ocean marine and not to statutory enactment, therefore ocean marine is determined by the pen of the underwriter, and what is once ocean marine is always ocean marine.

Interrogatory #61

> "State in detail defendant's standard to determine what is "commonly" and what is not as set forth in Section 1113 (20)".

Response

> The custom of the Industry".

Respondent's answer admits the case in chief. The policies at issue are ocean and do not offend the Insurance Law. The complaint spells out the ocean marine terms

which have been admitted by respondent and which were of sufficient weight to cause the Court to deny respondent's motion to dismiss.

As stated above the complaint completely and totally describes the policies at issue which were accepted by the beneficiary of same, the alleged taxpayer. The standard of what is an ocean marine insurance policy is not determined by the respondent but that which the insurance industry draws the ground for the construction of the policies, in this case London. This is illustrated by the Insurance Law Section 1113 (20d) and respondent's response to interrogatory 61.

The policies at issue were executed and operative insurance contracts with premiums due owing and paid concerning

years 1985 through 1987. As this matter is exclusively Admiralty, a tax on marine insurance is outside the reach of the New York State Tax. Such tax cannot be construed as a barrier to its jurisdiction. New York State cannot tax an ocean marine policy, as such tax abridges the Constitution of the United States.

ORIGIN TO DESTINATION § 2117

The reach of an ocean marine Policy is from "the point of origin to final destination".

The policies at issue are drawn to meet the criteria set forth in § 2117 of the Insurance Law which section specifically incorporates the rule from origin to destination.
Petitioner sought to determine what respondent's thinking was on this issue and

presented interrogatories 65,66 and 67 which we quote also with respondent's responses:

Interrogatory #65

> "State whether the defendants have received or given any legal opinions or statements with respect to section 2117 of the "Insurance law which states that ocean marine Insurance extends "from the point of origin to final destination."

Response

> "Counsel for the Plaintiff is invited to examine, inspect or audit the file maintained on this topic by defendants at 160 West Broadway, New York, New York (21st floor) and to make copies, compilations or abstracts, pursuant to rule 33 (c) F. R. Civ. P."

Interrogatory #66

> "Have the defendants issued any directives, regulations, rules or obtained any opinions with respect to meaning of "from point of origin to point of destination" as described and

set forth in section 2117 of the Insurance Law.

Response

"No."

Interrogatory #67

"If defendants have obtained any written opinion or memorandum or any written statement or issued directives etc. as referred to in Interrogatories 66 and 67 with respect to section 2117 wherein it's stated "from point of origin to final destination," attach copies of all documents to the Interrogatories."

Response

"Not applicable."

Interrogatory#34

"State whether the basis for the ocean marine Insurance exemption from the New York Insurance Law is the fact that ocean marine concerns foreign commerce.

Response

Yes, among other bases."

The incomplete responses or lack of them are a mirror of the controversy. It is the respondent's failure to come to grips with the issues, undoubtedly out of weakness, with the hope that the Federal Court will throw up its hands and let the respondent proceed in its own merry way.

TEST FOR OCEAN OR INLAND POLICIES

The District Court considered insurance coverage of inland carriage as crucial for its decision rather than the whole marine policy which should have been its criteria. These policies should be treated and analyzed as a whole, entire contract and not by its parts.

The New York State Insurance Law does not take into consideration anything other than the whole and entire policy; therefore ocean marine should be distinguished from inland marine insurance leaving ocean marine insurance exempt from controls and regulation.

The fact that ocean marine insurance includes inland coverage is not new nor surprising. We cite the following cases to support this view: Murjoe Distributors Inc. v. Reliance Insurance Company 1989 AMC2015 (Sup/NY 1989); Commercial Union Ins. Co. v. Spanish-American Line Stainless Corp 83 CIV.0317; (SDNY 1985) (not otherwise published); Margo Manufacturing v. Chamlin 1978 AMC1274 (SDNY 1978); Scarborough Co. v. American Manufacturers Mutual Insurance 107 Misc 2nd 772, 435 NYS 2nd 997 Aff'd 79AD2 942, 439NYS 298; Dover, Handbook of

marine Insurance 8th Edition pg. 322,.

Albany Ins. Co. v. Harry Esses etal (Sup/NY 4-6-90) (not otherwise published).

The above cited cases concern warehouse extension clauses of an ocean cargo transit policy insuring cargo in warehouses under the terms of an ocean marine policy. The fact that the insured cargo is in warehouses does not in any way change the policy and its terms being ocean marine. It is still an entire ocean marine policy and the Court cases so declare .

Murjoe Distributors Inc. v. Reliance Insurance Company supra, the court set forth the test to determine whether a policy is was to be treated as an entire contract or divisible:

> " Fundamentally and primarily, the question of divisibility or severability rests upon the question

> of intention of the parties deductible from the stipulations of the contract and the rules and construction governing the ascertainment of that intention. As a general rule, a contract is entire when by its terms, nature and purpose, it contemplates and intends that each and all of its parts and the consideration therefore shall be common each to the other and interdependent. On the other hand, the contract is considered severable and divisible when by its terms, nature and purpose, it is susceptible of division and apportionment."
>
> p2200

The above quoted rule regarding policy interpretation would require the denial of respondent's motion based upon the facts presented. There can only be one conclusion, that the policies are ocean marine.

The puzzle in this case is the position taken by both the District court as well as the Court of Appeals in accepting as a fact that coverage rather than the terms of the entire policy is the

governing criterion to determine whether the policy of insurance is ocean marine. The respondent without reservation recognized the exclusion of ocean marine insurance from the Insurance Law and regulation in its answer and which was further illustrated by respondent's response to interrogatories "Custom of Trade' and "Foreign Trade'.

Respondent's view of ocean marine insurance was that it was totally separate and apart from inland Insurance, therefore only subject to the Federal government's powers. The respondent's answer accepted the reach and concept of the instant policies and in no way inferred that the New York State Insurance Law for tax purposes or for any other purpose condones the concept of separate coverage as controlling to determine the nature of the

policy as did the District Court and the Court of Appeals without authority and without the support of the respondent.

The District Court's and Court of Appeal's analysis of the Insurance Law as it related to the instant policies were both improper and incorrect . This case is clearly outside the New York Insurance Law its regulation and tax. The Court should proceed promptly to the trial of the action as the Tax Injunction Act is without question wholly inapplicable.

CONFLICT OF LAWS

The District Court's opinion suggests that this action should be brought in the State Court; however the court does not make any mention of the conflict of law rules applicable to this case. Under

these rules a State Court looks to the Federal Admiralty Law regarding the effect to be given the law applicable to marine insurance pursuant to the Admiralty insurance law of the United States.

In the case at bar the Court may look to England by reason of comity to obtain the insight of the English Courts regarding marine insurance policies including the applicability and effect of the Marine Insurance Act of 1906. This Act is made applicable as all policies at issue are specifically made subject to it by the incorporation of the following terms, "This insurance is subject to English Law and Practice" and The Almar 1954 AMC 1674,1684, 1685,(Sup/NY 1954) and Parks, The Law Practice of Marine Insurance and Average Vol 1 pg. 16 and 17 (1987). The author states that English Courts may then

look to the decisional law of the United States Federal Courts for guidance concerning the law of insurance. Lenfest v. Coldwell,525 F2 717,724 (2nd Cir. 1975). The fact that the policies are English may suffice for English law to be controlling.

A best illustration of conflict doctrine regarding the operation of the law of Admiralty and in particular of marine insurance is the case of The Almar, supra at page 1684 and 1685.

> "But whatever may be the governing law under usual conflict of law doctrine, the decisive consideration in the instant case is that the contract under review is one of marine insurance. Such an instrument is deemed subject to the law of admiralty. ... Citing Cases... And in the law of admiralty, by dint of the delegation of power to the federal government in such matter by the United States Constitution, Art III, § 2, the general federal law and not that of the States prevails. ... Citing Cases... That federal law here, uniquely enough, refers to the law of England. "Federal courts look to the

> law of England for guidance in matters of marine insurance and follow them unless, as matter of policy, a different rule has been adopted" (Aetna Ins. Co. vs. Houston Oil & Transport Co., supra, 1931 A.M.C. 995, 49 F (2d) at 124), "as in cases of marine insurance it is highly desirable that our decisions be kept in harmony with those of England, ' the great field of this business.' ... Citing Cases...

By reason of above, this complaint ought to be and was filed in the United States District Court as said court's jurisdiction in admiralty is binding on state courts by reason of Supremacy, National Harmony, and Uniformity. Respondent's in personam appearance is sufficient to compel respondent to comply with any decision rendered by the District Court. To compel the petitioner to file an action in a state court even though Supreme Court review is possible is an exercise of Judicial duplication and dodging rather than confronting the issue as

Constitutionally anticipated. Article III §2 (1) of the United States Constitution supra and the Federalist. supra p. 563.

REVERSAL OF RESPONDENT'S TAX

On July 1st 1990, shortly after the final District Court argument of June 8th, 1989 of this motion, the New York State Legislature Act overode and superseded respondent's Circular Letter 21 substituting § 9102 and subdivisions of the " Insurance Law", which section is based on apportionment by location of the thing taxed rather than the Circular Letter 21's standard which tax locations both within and without the State. The new legislation was retroactive for three years from July 1990.

On June 8th, at the argument before the District Court, petitioner did not know of the change in the tax law. No mention was made of this change, but thereafter petitioner by its motion for reconsideration and later its reargument motion did point out to the court the change in law, but respondent offered no amendments to pleadings and no explanation. The retroactive effect only touches this case for six months.

On the other hand we urged that the change in the "Insurance Law' with respect to the tax threw a cloud over the applicability of the Tax Injunction Act as the taxing rule of Circular Letter 21 had been overthrown and superseded, thereby making the tax assessment as against petitioner questionable.

Respondent's taxing concept was so obviously faulty and unconstitutional from both a state and federal point of view that for a court in Admiralty to enforce the Tax Injunction Act under these circumstances must be an act blind enforcement with no attempt to evaluate Circular Letter 21.

No Act of Congress can be all consuming and commanding that a United States District Court must follow regardless of the explained state of the facts and law as exists in this case. The District Court as well as the Circuit Court erred in dismissing the amended complaint in face of the proof presented establishing flaws existing in Circular Letter 21. The administrative, legislative, constitutional and legal bases for a tax assessment to trigger the application of the Tax Injunction Act was totally absent, and in

this absence the enforcement of the provision of the Tax Injunction Act by the District Court and Court of Appeals was error.

THE TAX INJUNCTION ACT

The question is whether the Tax Injunction Act 28 USC.1941 is a applicable to the case at bar. This act is strictly limited to a tax assessment made by the State which bars the jurisdiction of the United States District Court. The Act's application is limited to assessment which must be made by the state, which by definition are either taxable by state Law, as result of some taxable connection with the state or on the other hand not controlled by federal law. Where the subject matter is foreign commerce, for example, ocean shipping containers, which

come to rest in a state, as in the Japan Line case, supra, the rule of apportionment applies. That is not the case here, as the ocean marine policy is in itself foreign trade imported into the United States as one entire contract, not subject to tax apportionment.

An ocean marine policy of insurance is immune and exempt from tax under any of the state laws, but is subject to excise tax of the Federal Government.

A tax on Foreign Trade is vested only in the Congress of the United States- Article 1, § 8, Clause 1 of the United States Constitution states:

> The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises

> shall be uniform throughout the United States;"

Article 1, § 8, Clause 3 of the United States Constitution provides:

> To regulate Commerce with foreign Nations, and among the several States..."

In the Japan Line supra, the court rule of apportionment was stated.

The court interpretation of a tax affecting foreign trade is determined by whether the tax conforms to the above court rule. Federal law demands that such tax must meet the standard of the U.S. Constitution. Therefore, a state tax on foreign trade is a nullity and not one within the purview of the Tax Injunction Act since the state tax is invalid. A state tax must meet the states own standard or be overturned as was Circular letter 21.

Thus, the Tax Injunction Act's enforceability rests on control encompassed over the thing taxed. But where as here the policy of insurance is an instrument of foreign trade and by its definition outside the control of the state, then said policy is not taxable by the state. The thrust of petitioner's argument is not tax, but directed to what is taxed. This argument is supported by the "Insurance law" exempting ocean marine from tax.

Logic suggests that the court should begin at the beginning of the case, not at the conclusion. The complaint sought declaratory relief that policies were ocean marine and encompassed the entire controversy totally and apart from assessment of tax by state.

The primary thrust is showing that the policies are ocean marine, the subject of the declaratory judgement action rather then the challenge against a tax assessment.

TAX ON FOREIGN COMMERCE

Where an instrument taxed is a creature of foreign trade as is an ocean marine insurance policy, a tax on the policy would infringe on the government speaking with one voice and further there exists the possibility of international multiple taxation. Japan Line, supra. A tax assessment involving ocean marine insurance which is foreign commerce is without the scope of the Tax Injunction Act as said tax falls in constitutional review not legislative review.

Where the matter is Admiralty, uniformity and harmony of law are a constitutional block to an act of an individual state which could infringe on the Admiralty and Maritime Law. It has been stated that " Maritime Law preempts state law when the state law infringes on international or interstate relation:" Exxon Corp v. Chick Kam Choo 817F2d 307, 317, 318 (5 Cir 1987), rev'd on other grounds, 108 US S ct 1684 (1988): Volume 1 Benedict on Admiralty § 112 (7-39) Kossick v. United Fruit 365 U.S. 731 (1961). The District Court, without ruling on the essential question of whether admiralty jurisdiction applied in this case, dismissed the complaint. This was error.

ELEVENTH AMENDMENT AND TAX INJUNCTION ACT

The Eleventh Amendment was raised as a defense by respondent, but the question of the applicability of the defense was left undecided by the District Court. This Amendment has certain characteristics which have a bearing on the Tax Injunction Act. The Eleventh Amendment bars action in Federal Courts when a state's sovereignty is in question and Tax Injunction bars Federal Court intervention when state tax assessments are at issue.

The broad-based application and enforcement of both are given by the courts except when the Admiralty Law is present, and there we find decisional limitations imposed when the Courts apply the Eleventh Amendment. The Tax Injunction Act, we find, lacks case law on the subject, but certainly interpretative rulings regarding

Eleventh Amendment should have bearing on the application of Tax Injunction Act.

While neither Workman v. New York City 179 U.S. 552(1900) nor Principe Compania Naviera S.A. v. Board of Commission 333 F.S. 353 (E.D. Louisa 1971) have a direct bearing on the Tax Injunction Act as these holdings are under the Eleventh Amendment, we urge that their decisional reasoning should be used as guide and tool for interpretation of the Tax Injunction Act. Both cited cases limit the force of Eleventh Amendment in the Admiralty area. Further limitation has been imposed by the court where Admiralty is in place. The 11th Amendment of the Constitution is not a bar to an action in Admiralty for equitable relief Florida Department of State v. Treasure Sailors 458 U.S. 670 (1982)

In Cobb Coin v. Unidentified Wrecked & Abandoned Sailing Vessel, 525 Fed.Supp.186, 1983 A.M.C.966 (U.S.D.C.Fla. District 1981)

> "(8) But at this date, it is clear that the immunity afforded by the Eleventh Amendment extends only to suits in which a plaintiff seeks compensatory money damages which would be payable from the state treasury. Edelman v. Jordan, 415 U. S. at 633, 677, 94 S. Ct. at 1356, 1362. p.197

In another Admiralty case Florida Department of State v. Treasure Salvors, supra, the court stated:

> "...a suit for specific relief against the officer is not barred by the Eleventh Amendment. this conclusion follows inevitable from Ex parte Young. If conduct of a state officer taken pursuant to an unconstitutional state statute is deemed to be unauthorized and may be challenged in federal court, conduct undertaken without any authority whatever is also not entitled to eleventh Amendment immunity.
>
> p.697

In Principe Compania Naveria S. v Board of Commission 333 F.S. 353 (E A Louisa 1971) the Court states.

> "...this Court can find no valid reasons supporting the doctrine of immunity sufficient to offset the strong reason stated by the Supreme court in Workman for not recognizing the state immunity doctrines in a court of admiralty".

Petitioner urges that the court should and must place limitations on Tax Injunction Act and that these limitations most logically are in the area of Admiralty and Foreign Trade as both directly relate to the Constitution, whereas the force of the Tax Injunction Act is legislative as compared to authority vested by reason of the constitution. The Workman v. New York City, supra, and Principe Compania Naveira S A v. Board of Commission supra, Exxon Corp. v. Chick Kam Choo, supra, cases reflect the decisional limitation placed by

Courts on the application of the Eleventh Amendment where Admiralty and Maritime jurisdiction prevail and as previously noted; an act of a legislature cannot take free of Admiralty as it is Constitutionally rooted.

WHEREFORE CLAUSE

The threshold issue in this appeal is whether the policies at issue are ocean marine. On the other hand the District Court stated "Since Avon is clearly seeking to adjourn the assessment of defendant's tax" the court incorrectly believed that the heart of matter was an injunction against assessment of the tax.

To determine whether an injunction was sought for the purposes of enforcing a judgment of the court, one must only look

to the amended complaint "Wherefore clause" to dispel any such notion.

Petitioner was concerned with the possibility of losing his license during pendency of the action and therefore requested a restraining order to prevent this from happening. Other than this, there is no suggestion set forth in the Wherefore Clause that an injunction was ever sought to enforce a judgment in this case nor was any granted.

CONCLUSION

Before this Court is more than sufficient evidence to establish that the policies at issue are ocean marine. This proof at one time both confirms and substantiates the Admiralty and Maritime jurisdiction of the Court and the basis for

the exemption from any taxation of the State of New York. The changing and the overturning of the tax scheme of New York clearly proves that the taxing of petitioner was illfounded.

The District Court as well as the Court of Appeals committed error as both failed to note the Admiralty and Maritime jurisdiction, and, further, erroneously placed total and complete reliance on the Tax Injunction Act without any diligent effort to fulfill the Court's obligation to hear and decide the facts and law of the case. A fair hearing would certainly have resulted in favor of the petitioner on this motion.

The order and judgment of the District Court and the Court of Appeals should be reversed.

Respectfully submitted,

The Law Office of Jerrold E. Hyams

Attorneys for Petitioner

Andrew R. Colmant

Jerrold E. Hyams

of Counsel

APPENDIX

United States Court of Appeals

FOR THE

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of February, one thousand nine hundred and ninety-one.

Present: Hon. THOMAS J. MESKILL,
Hon. GEORGE C. PRATT,
Hon. JOHN M. WALKER, JR.,

Circuit Judges,

AVON GROUP, INCORPORATED,

Plaintiff-Appellant,

v.

STATE OF NEW YORK INSURANCE DEPARTMENT; WENDY E. COOPER, Acting Superintendent of Insurance,

Defendants-Appellees

Docket No. 90-7753

A petition for a rehearing having been filed herein by Appellant AVON GROUP INC.,

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

/s/

Elaine B. Goldsmith,
Clerk

88-cv-8880
S.D.N.Y.
Judge Sprizzo

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of January one thousand nine hundred and ninety-one.

Present: Honorable THOMAS J. MESKILL,
Honorable GEORGE C. PRATT,
Honorable JOHN M. WALKER,

Circuit Judges,

AVON GROUP, INCORPORATED,

Plaintiff-Appellant,

v.

STATE OF NEW YORK INSURANCE DEPARTMENT; WENDY E. COOPER, Acting Superintendent of Insurance,

Docket No. 90-7753

Defendants-Appellees.

This is an appeal from a judgment of the United States District Court for the

Southern District of New York, Sprizzo, J., dismissing appellant's amended complaint without prejudice to its commencing an action in the appropriate court of the State of New York. Avon Group, Inc. v. State of N.Y. Ins. Dep't, 741 F.Supp. 82 (S.D.N.Y. 1990). Judge Sprizzo held that the Tax Injunction Act, 28 U.S.C. § 1341, barred the district court from adjudicating appellant's challenge to a state tax assessment.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgement of the district court is AFFIRMED substantially for the reasons

stated by Judge Sprizzo in his Memorandum Opinion and Order below dated July 18, 1990.

/s/
Thomas J. Meskill, U.S.C.J.

/s/
George C. Pratt, U.S.C.J.

/s/
John M. Walker, U.S.C.J.

N.B.: This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AVON GROUP, INC.,

Plaintiff,

against

STATE OF NEW YORK INSURANCE DEPARTMENT and WENDY E. COOPER, ACTING SUPERINTENDENT OF INSURANCE,

88 CIVIL 8880 (JES) JUDGMENT

Defendants.

TIME STUDY CASE
Record time spent by Judge or Magistrate

Defendant, State of New York Insurance Department, having moved to dismiss the complaint for lack of subject matter jurisdiction, pursuant to F.R.Civ.P. 12(b)(1), and the said motion having come before the Honorable JOHN E. SPRIZZO, U.S.D.J., and the Court thereafter on July 8, 1990, having handed down its memorandum opinion and order (#66431); dismissing

plaintiff's amended complaint without prejudice to plaintiff's commencement of an action in the appropriate court of the State of New York, it is,

ORDERED, ADJUDGED AND DECREED: That plaintiff's amended complaint be and it is hereby dismissed without prejudice to plaintiff's commencement of an action in the appropriate court of the State of New York.

Dated: NEW YORK, NEW YORK
August 8, 1990

/s/ Raymond F. Burghard
Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 8-8-90

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AVON GROUP, INC.,

Plaintiff(s),

-against-

STATE OF NEW YORK INSURANCE DEPARTMENT and WENDY E. COOPER, ACTING SUPERINTENDENT OF INSURANCE,

88 CIVIL 8800 (JES) ORDER

Defendant(s).

The above-captioned action having come before the Court and the Court having dismissed plaintiff's amended complaint in a Memorandum Opinion and Order dated July 18, 1990 and the plaintiff having submitted a letter to the Court dated July 18, 1990, received by the Court on July 20, 1990, and the Court having construed this letter as a motion for reconsideration and the Court having

considered all issues raised in plaintiff's submission[1], it is

ORDERED that plaintiff's motion for reconsideration shall be and hereby is denied.

Dated: New York, New York
July 25, 1990

/s/
John E. Sprizzo
United States District Judge

---

[1] Plaintiff cites recent amendments to the New York Insurance Law claiming that the amendments confirm its argument that "Ocean Marine" insurance policies are exempt from the tax imposed upon excess lines insurance policies. However, the Court concludes that pursuant to the Tax Injunction Act, see 28 U.S.C. § 1341 (1988), these arguments must be raised in the New York State courts.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AVON GROUP, INC.,

Plaintiff(s),

-against-

STATE OF NEW YORK INSURANCE DEPARTMENT and WENDY E. COOPER, ACTING SUPERINTENDENT OF INSURANCE,

88 Civ. 8880 (JES)
ORDER

Defendant(s).

The above-captioned action having come before the Court and the Court having dismissed plaintiff's amended complaint in a Memorandum Opinion and Order dated July 18, 1990 and the plaintiff having submitted a letter to the Court dated July 18, 1990, received by the Court on July 20, 1990, which the Court construed as a motion for reconsideration and the Court having denied this motion by Order dated July 25, 1990 and plaintiff having submitted a formal motion for reargument dated July 30, 1990 and the Court having

considered all issues raised in plaintiff's motion[1], it is

ORDERED that that the Order in the above-captioned action dated July 25, 1990 is vacated; and it is further

ORDERED that plaintiff's motion for reargument shall be and hereby is denied.

Dated: New York, New York
July 31, 1990

/s/
John E. Sprizzo
United States District Judge

---

[1] Plaintiff cites recent amendments to the New York Insurance Law claiming that the amendments confirm its argument that "Ocean Marine" insurance policies are exempt from the tax imposed upon excess lines insurance policies. However, the Court concludes that pursuant to the Tax Injunction Act, see 28 U.S.C. § 1341 (1988), these arguments must be raised in the New York State courts.

AVON GROUP, INC., Plaintiff(s),

v.

STATE OF NEW YORK INSURANCE DEPARTMENT and Wendy E. Cooper, Acting Superintendent of Insurance, Defendant(s).

No. 88 Civ. 8880 (JES).

United States District Court,
S.D. New York.

July 18, 1990.

Excess lines insurance broker brought admiralty action against New York Department of Insurance seeking to enjoin assessment of tax on gross premiums. On motion to dismiss, the District Court, Sprizzo, J., held that action was barred by the Tax Injunction Act.

Complaint dismissed.

Jerrold E. Hyams, New York City (Andrew R. Colmant, of counsel), for plaintiffs.

Robert Abrams, Atty. Gen., New York City (David S. Cook, of counsel), for defendants.

MEMORANDUM OPINION AND ORDER

SPRIZZO, District Judge:

Plaintiff, the Avon Group, Inc. ("Avon"), brings this admiralty action against the Department of Insurance of the State of New York and the acting Superintendent of the Department (collectively, the "State"), seeking an order enjoining the State from assessing against Avon a tax discussed more fully herein. Currently before the Court is the State's motion to dismiss the complaint for lack of subject matter jurisdiction

pursuant to Fed.R. Civ.P. 12(b)(1).[1] For the reasons stated herein, the State's motion is granted.

The facts relevant to the determination of the motion are set forth in plaintiff's amended complaint. Avon is a licensed excess lines insurance broker[2] which, inter alia, places a type of insurance called "Ocean Marine Cargo Transit Insurance" in the London Market.

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[1] The State raises several grounds for dismissing the complaint, i.e., the Eleventh Amendment of the United States Constitution, abstention, the Tax Injunction Act and lack of an admiralty question. Since the Court concludes that jurisdiction is barred by the Tax Injunction Act, the other grounds relied on by the State need not be addressed.

[2] An excess lines broker is authorized to procure certain types of insurance from insurers which are not authorized to transact business in New York. See N.Y. Ins. Law § 2105(a) (McKinney 1985).

(2)

No. 90-1793

Supreme Court, U.S.
FILED
JUL 15 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AVON GROUP, INC.,

Petitioner,

—vs.—

STATE OF NEW YORK INSURANCE DEPARTMENT and WENDY E. COOPER, ACTING SUPERINTENDENT OF INSURANCE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1793

AVON GROUP, INC.,

Petitioner,

—vs.—

STATE OF NEW YORK INSURANCE DEPARTMENT and WENDY E. COOPER, ACTING SUPERINTENDENT OF INSURANCE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for certiorari.

STATEMENT OF THE CASE

Petitioner commenced this action, seeking declaratory and injunctive relief, in the United States District Court for the Southern District of New York.[1] It alleged in its amended

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1 Petitioner's disclaimers of any request for injunctive relief are contradicted by the Record. In its amended complaint, petitioner ex-

complaint that the action was brought pursuant to the district court's admiralty jurisdiction. The Court is respectfully referred to the district court's opinion for a description of the nature of the action. *Avon Group, Inc. v. State of New York Insurance Dept.*, 741 F. Supp. 82 (S.D.N.Y. 1990). (Pet. A-20).

The district court dismissed the action on the ground that the Tax Injunction Act, 28 U.S.C. § 1341 (1988), deprived the court of jurisdiction to grant either injunctive relief, 741 F. Supp. at 83, or declaratory relief. *Id.* at 83 n.4. (*citing California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982).

On appeal to the United States Court of Appeals for the Second Circuit, the district court's judgment was summarily affirmed, substantially for the reasons stated by the district court. The court of appeals denied petitioner's petition for rehearing.

REASONS FOR DENYING THE WRIT

Petitioner asserts that the Tax Injunction Act is inapplicable because (1) the Act does not apply in admiralty cases, and (2) the Act does not apply to state taxes on foreign commerce. These arguments do not raise serious legal issues warranting review by this Court.

Petitioner's first argument, that the Tax Injunction Act does not apply in admiralty cases, is premised on the assumption that the amended complaint correctly invoked the district court's admiralty jurisdiction. Avon argues mechanically that the policies whose premiums are taxed by respondents are "ocean marine" policies, and that the subject matter of its

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pressly sought "[t]hat the defendants be restrained and enjoined from taking further proceedings within the New York Insurance Department against AVON GROUP, INC., as the Insurance Department . . . threatens tax assessments, penalties and interest. . . ." (Amended Complaint, Wherefore clause, ¶ 4.)

action is maritime. Thus, it concludes, this is a case involving admiralty law over which a federal court has jurisdiction. *See De Lovio v. Boit*, 7 Fed. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776) (Story, J.). Avon is wrong. Neither the subject matter of the controversy nor the relationship of the parties is maritime in nature. *See generally Exxon Corp. v. Central Gulf Lines, Inc.*, __ U.S. __, 59 U.S.L.W. 4571 (June 3, 1991). This is not a suit for breach of an ocean marine policy. Instead, it is a challenge to the exercise of the State's regulation of the procurement of such policies, and is far removed from any maritime concerns. *See infra* at 5.

Admiralty courts are constituted to try actions for damages arising from torts at sea or from marine contracts, *Berwind-White Coal Mining Co. v. City of New York*, 135 F.2d 443, 446 (2d Cir. 1943), *see* Jhirad, Sann, Chase & Chynsky, 1 *Benedict on Admiralty* § 106 (7th ed. 1985), not declaratory or injunctive relief challenges to State legislative actions. Moreover, Avon's invocation of the court's admiralty jurisdiction ignores that traditionally, admiralty courts had none of the powers of a court of equity, *The Eclipse*, 135 U.S. 599, 608 (1890); *United Transportation and Lighterage Co. v. New York & Baltimore Transp. Line*, 185 F. 386, 389-90 (2d Cir. 1911), and could not grant equitable relief even for the purpose of complete justice. *The Ada*, 250 F. 194, 195 (2d Cir. 1918); *cf. Swift & Co. Packers v. Campania Colombiana Del Caribe, S.A.*, 339 U.S. 684 (1950); *Schoenamsgruber v. Hamburg Line*, 294 U.S. 454, 457-58 (1935).

Avon cites no case in which an admiralty court has granted declaratory and injunctive relief from a tax. To the contrary, in *Sipe v. Amerada Hess Corp.*, 689 F.2d 396 (3d Cir. 1982), the Third Circuit held that the Tax Injunction Act barred a federal court challenge brought by seamen to the application to them of a New Jersey unemployment compensation tax. Indeed, an admiralty court sitting prior to the enactment of the Tax Injunction Act found that it lacked the jurisdiction to grant injunctive relief from a tax statute. *Streckfus Steamers v. Mayor and Board of Alderman*, 10 F. Supp. 529 (S.D. Miss. 1935), *aff'd*, 81 F.2d 298 (5th Cir. 1936).

Moreover, contrary to Avon's contention, a limitation of a district court's jurisdiction, such as the Tax Injunction Act, does not even arguably infringe the Article III grant of admiralty jurisdiction unless it exceeds the limits established by this Court in *Panama Ry. Co. v. Johnson*, 264 U.S. 375 (1924). *See Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1244 (3d Cir. 1977), *cert. denied*, 434 U.S. 861 (1977); *Zych v. Unidentified, Wrecked and Abandoned Vessel*, 746 F. Supp. 1334, 1345-46 n.14 (N.D. Ill. 1990). *See also Palmore v. United States*, 411 U.S. 389 (1973).[2]

In *Panama Railway*, this Court held that there are two limits on Congress' power to alter admiralty law:

> One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provisions require that the enactments . . . shall be co-extensive with and operate uniformly in the whole of the United States.

Panama Ry. Co. v. Johnson, 264 U.S. at 375. *See also Hurst v. Triad Shipping Co.*, 554 F.2d at 1245 (". . . ban on congressional interference with jurisdiction can relate only to extreme tampering with the territorial or subject matter jurisdiction of admiralty and maritime courts"). The Tax Injunction Act does not approach these boundaries. By excluding from the district court's jurisdiction the power to interfere with the enforcement of state tax laws, it does not exclude a

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2 "[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Palmore v. United States*, 411 U.S. at 401 (quoting *Cary v. Curtis*, 3 How. 236, 245 (1845)).

thing clearly falling within admiralty jurisdiction. As stated above, admiralty courts traditionally lacked the power to issue equitable relief, let alone an injunction such as the one sought here. Thus, in terms of admiralty jurisdiction, the Tax Injunction Act does no more than codify traditional limits of admiralty jurisdiction.[3]

Nor does the Tax Injunction Act interfere with a uniform system of maritime law. The fact that each State separately licenses insurance brokers who procure marine insurance and imposes differing requirements or even taxes on the activities of those brokers does not violate the uniformity of maritime law. Brokers are not sea-goers; they are resident ashore, conduct their activities ashore, and thus are properly subject to local laws.

Petitioner argues that the Tax Injunction Act is inapplicable in cases where states levy a tax on foreign commerce. Petitioner misunderstands the Act. While constitutional objections may be raised to such taxes, these objections must be heard, as the district court below held, in state courts first. The plain language of the Tax Injunction Act admits of no exceptions, where, as here, the laws of the State afford a plain speedy and efficient remedy to the taxpayer.

As a final matter, this case is of little practical significance inasmuch as New York has amended the challenged tax, N.Y. Insurance Law § 9102(b)(1) (McKinney's Supp. 1991), so that resolution of the issues raised by petitioner will affect only those brokers who, like petitioner, are delinquent in taxes for periods prior to July 1, 1987. *See* Pet. at 22, 49.

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3 This is so even though in modern times, federal courts in admiralty cases may issue declaratory relief. *See New York State Waterways Ass'n v. Diamond*, 469 F.2d 419, 421 n.1 (2d Cir. 1972).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Dated: New York, New York
July 15, 1991

Respectfully submitted,

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(3)

No.90-1793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AVON GROUP, INC.,

Petitioner,

vs.

STATE OF NEW YORK INSURANCE DEPARTMENT and WENDY E. COOPER, ACTING SUPERINTENDENT OF INSURANCE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioner respectfully submits this brief in reply to respondent's opposition brief.

Statement of Rebuttal

INTRODUCTION

This petition is directed at the question of the United States District Court's dismissal, which precluded Avon's admiralty case from being decided in an admiralty court. It is respectfully requested that this case be remanded back to the District Court for a hearing on the admiralty issue alone. *See Petition for Writ at Page 5.*

This case centers around the New York State Insurance Department's interpretation of an ocean marine

insurance policy. No other insurance contract in existence covers against all risks from point of origin until final destination, at any location, of any description, anywhere in the world and in transit by any means of conveyance. An ocean marine insurance policy is based upon the utmost good faith and is ancient in its tradition. Such policies are traditionally exempt from regulation by the states. Ocean marine insurance policies are the most international of documents in their reach.

Both the Federalist Papers and the Constitution acknowledge admiralty supremacy and we hope the Supreme Court remembers that as well. New York State recognizes the need for national uniformity in admiralty matters and thus acknowledges ocean marine insurance as

exempt from its regulation. The dispute here surrounds the nature of the policy at issue and is clearly distinct from any question as to the state's power to tax.

The question as to the nature of the policy, taken alone, is subject to the admiralty jurisdiction of the federal courts. Respondent argues, and the District Court held, that the issue of interpretation is necessarily related to the issue of New York State's ability to tax. Petitioner seeks to realign the inquiry so that only the admiralty issue is given consideration.

Questions Presented

1. Do Federal Admiralty Courts have jurisdiction over this matter?

2. May Federal Admiralty Courts issue declaratory relief?

3. Should the Tax Injunction Act apply in this case?

Petitioner's position is that (1) this dispute is firmly within the admiralty jurisdiction of the federal courts, (2) only declaratory relief is being requested here and such relief is clearly within the purview of federal courts, New York State Waterways Ass'n v. Diamond, 469 F.2d 419, 421 n.1 (2d Cir. 1972), and (3) the Tax Injunction Act is inapplicable because (a) this is a dispute about the interpretation of an ocean marine insurance policy, not the "assessment, levy or collection of any tax under state law", 28 U.S.C. 1341, (b) the admiralty question is separate and apart from any issue as to the power of

the State to tax, and (c) admiralty is supreme. *See Petition for Writ at Page 28.*

Respondent's argument, woven into the morass of its opposition brief, appears to be that (1) this is not a maritime dispute, (2) even if it is cognizable under federal law, admiralty courts may not grant injunctive or declaratory relief, and (3) even if the requested relief is available, the Tax Injunction Act bars consideration by the federal courts.

Petitioner's argument, in relation to 28 U.S.C. 1341, is that the Tax Injunction Act is inapplicable because this dispute does not concern the imposition of a tax, but rather the interpretation of an insurance policy.

In order to reach this argument, Petitioner first addresses two threshold issues: (1) admiralty jurisdiction is present (2) declaratory relief is proper in admiralty actions.

(1) ADMIRALTY JURISDICTION IS PRESENT PURSUANT TO:

(a) The Constitution

(b) F.R.C.P. Rule 9(h)

(c) The Presence of An Admiralty Question

(a) Article III, Section (1) of the United States Constitution provides that the judicial power shall extend to "All cases of admiralty and maritime jurisdiction . . . " See *Petition for Writ at Page 25.*

That causes in admiralty are within the Judicial Power of Article III is clearly established. See *Petition for Writ at Pages 24-28.*

(b) A proper pleading need only sound in Admiralty. F.R.C.P. Rule 9(h) states: "If the claim is cognizable only in admiralty, it is an admiralty or maritime claim . . . whether so identified or not."

(c) Whether federal law governs in this matter depends on whether this case is within the admiralty and maritime jurisdiction conferred by the Constitution of the United States and jurisdictional statutes, Victory Carriers Inc. v. Law, 404 U.S. 202, 204.

Admiralty jurisdiction over contracts is determined by reference to the nature and subject of the contract and whether the injury complained of had the requisite maritime flavor, Executive Jet Aviation Inc. v. City of Cleveland, 409 U.S. 249(1972). The rule is well settled that ocean marine insurance is within the jurisdiction of the admiralty courts, *See Petition for Writ at Page 31.*

The issue in this case is whether or not a policy is indeed "ocean marine". The "nature and subject matter" of the contract at issue should be the crucial consideration in assessing admiralty jurisdiction. Exxon Corp. v. Central Gulf Lines, 111 S.Ct. 2071, 2076 (1991) quoting Insurance Co. v. Dunham, 11 Wall. 1, 26 (1871).

As the Court recently stated, "the fundamental interest giving rise to maritime jurisdiction is the 'protection of maritime commerce' ", Sisson v. Ruby, 110 S.Ct. 2892, 2898 (1990) quoting Foremost Insurance Co. v. Richardson, 457 U.S. 668, 674 (1982).

The Fifth Circuit, interpreting the requirements of Executive Jet *and* Foremost, *supra*, has fashioned criteria to decide the issue of maritime jurisdiction. These factors include: (1) the functions and roles of the parties, (2) the types of vehicles and instrumentalities involved, (3) the causation and type of injury, and (4) the traditional concepts of the role of admiralty at law. Kelly v. Smith, 485 F.2d 520, 525 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974). These were

later expanded by the Fifth Circuit to include: (a) the impact of the event on maritime shipping and commerce, (b) the desirability of a uniform national rule to apply to such matters, and (c) the need for admiralty expertise in the trial and decision of the case. Molett v. Penrod Drilling Co., 826 F.2d 1419, 1426 (1987).

Applying these considerations in the instant case, Petitioner feels it is abundantly clear that the nature of the insurance policy should be determined under the admiralty jurisdiction of the federal courts.

Respondent asserts that this is not a suit for breach of an ocean marine policy but rather a challenge to the exercise of the State's regulation of

the procurement of such policies and that as such is far removed from any maritime concerns. *See Brief in Opposition at Page 3.* Respondent not only misses the thrust of Petitioner's argument, but is wrong in its assessment of admiralty jurisdiction. Respondent is correct in that this is not a suit for breach of an ocean marine policy. But like such a suit, the issue here is the interpretation of an ocean marine policy. "The trend in modern admiralty case law . . . is to focus the jurisdictional inquiry upon whether the nature of the transaction was maritime", Exxon v. Central Gulf Lines, 111 S.Ct. 2071, 2076 (1991). Certainly a determination as to whether a policy is ocean marine, given that ocean marine insurance under the contract theory is squarely within

federal jurisdiction, should be subject to federal court jurisdiction.

(2) DECLARATORY RELIEF IS AVAILABLE IN ADMIRALTY CASES

Petitioner does not object to Respondent's position that traditionally Admiralty Courts had "none of the powers of a court of equity", See *Respondent's Opposition Brief at Page 3.* Neither does Petitioner object to Respondent's assertion that "in modern times, federal courts in admiralty cases may issue declaratory relief", See *Respondent's Opposition Brief at Page 3, n.3,* citing New York State Waterways Ass'n v. Diamond, 469 F.2d 419, 421 n.1 (2d Cir. 1972). Thus, since Petitioner seeks no

injunctive relief in this action (See *Petition for Writ at Page 11, 29*), as is shown in the Petitioner's amended complaint to the district court (See Reply Addendum), the relief sought is available. (While Petitioner requested that the district court enjoin New York State in regards to putting Avon out of business by revoking Avon's license, no other injunctive relief was requested.)

(3) THE APPLICABILITY OF THE TAX INJUNCTION ACT IS NOT REACHED UNTIL THRESHOLD ADMIRALTY ISSUES ARE RESOLVED

(a) Petitioner is not asking the Court to rule as to the applicability of the tax by the state of New York, but only as to the nature of the policy at

issue. Thus 28 U.S.C. 1341 which applies to the "assessment, levy or collection of any tax under state law" is inapplicable. Once the nature of the policy is determined, there will be no issue as to the applicability of the tax. Thus this dispute has nothing to do with the assessment of a tax; only with the interpretation of the nature of an insurance policy. Therefore this is not, as Respondent claims, a request for declaratory or injunctive relief from a tax, See *Respondent's Opposition Brief at Page 3.*

Respondent cites Sipe v. Amerada Hess Corp., 689 F.2d 396 (3d Cir. 1982) for the proposition that no admiralty court has granted declaratory or injunctive relief from a tax. *Sipe* however dealt with a distinguishable

situation and was a request for a different type of relief.

In Sipe, as in California v. Grace Brethren Church, 457 U.S. 393 (1982), the issue was whether the state could legitimately collect unemployment taxes pursuant to the Federal Unemployment Tax Act. The issue in this case, unlike Sipe and California v. Grace Brethren Church, is related to the interpretation of a marine insurance policy not the taxing power of the state. For if the policy is determined not to be "ocean marine" then Petitioner has no argument with the Respondent.

Thus the instant case is distinguishable from the above-cited cases both in that it is unrelated to the "assessment, levy or collection of any

tax under state law" and because only declaratory relief is being requested.

While the determination as to the nature of this policy will necessarily affect New York State's decision as to whether or not to continue to enforce the tax, it is nevertheless a separate issue, cognizable in the federal admiralty courts. See *Petition for Writ at Page 56.*

If the policies are held to be ocean marine, New York will admittedly have no right to tax the policies at issue. The result, while being of the type the Tax Injunction Act seeks to avoid, is not prohibited by the Act because the means to reach such decision are separate from any issue as

to the "assessment, levy or collection" of a tax.

(b) As stated above, the Tax Injunction Act is only applicable to the "assessment, levy or collection of any tax under state law." Because the policies at issue in this case are related to foreign commerce they are exempt from tax under any of the state laws but are subject to the excise tax of the Federal Government.

The Tax Injunction Act "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a state to administer its own fiscal operations", Tully v. Griffin, Inc., 429, U.S. 68, 73 (1976). The principal purpose of the Act is to limit

drastically federal court interference with local tax matters, Rosewell v. LaSalle National Bank, 450 U.S. 503, 522 (1981).

Given that this is an issue of maritime law, with a particular maritime flavor, Executive Jet, supra, and that it is strictly limited to interpretation of an insurance policy, the concerns of the drafters of the Tax Injunction Act do not apply. Thus, this is not an appropriate instance to apply such.

While Petitioner is seeking to have the Court interpret the nature of the policy at issue and even though such interpretation will have the effect of indirectly determining the validity of the tax by the state of New

York, such interpretation is necessarily separate and distinct from any issue as to New York's taxing power.

(c) Admiralty questions must have supremacy over questions of state law in order to preserve the harmony and uniformity of maritime law. *See Petition for Writ at Page 28.*

Should the several states have exclusive jurisdiction over certain admiralty matters because of the application of the Tax Injunction Act, then the uniformity and national harmony in the application of admiralty matters nationwide will be interfered with. *See Petition for Writ at Page 1.*

CONCLUSION

The District Court as well as the Court of Appeals committed error as both failed to note the Admiralty and Maritime jurisdiction, and, further, erroneously placed total and complete reliance on the Tax Injunction Act without any diligent effort to fulfill the Court's obligation to hear and decide the facts and law of the case. A fair hearing would certainly have resulted in favor of the Petitioner on this motion.

The order and judgment of the District Court and the Court of Appeals should be reversed.

Respectfully submitted,

The Law Office of
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REPLY ADDENDUM

(Copy from joint appendix Court of Appeals)

WHEREFORE, the Plaintiff seeks a Declaratory Judgment:

1. That the policy at issue is an ocean marine insurance policy.

2. That the jurisdiction of this Court is exclusive and binding upon the New York State Court as well as the New York State Insurance Department.

3. That the New York Insurance Department, its Superintendant and Excess Lines Supervisor, are bound to adhere to the ruling of this Court.

4. That the defendants be restrained and enjoined from taking further proceedings within the New York Insurance Department against AVON GROUP, INC.

as the Insurance Department not only threatens tax assessments, penalties and interest but also threatens that further proceedings will be instituted and in all probability those proceedings will be to suspend the Plaintiff's broker's license which will cause the Plaintiff irrevocable harm and loss of business and therefore the Restraint Order should be issued to prevent this result.

5. That this Decree of the Court of Admiralty not only binds the New York Insurance Department to the terms and conditions that the Court deems appropriate to foreclose any and all proceedings that AVON is now subject to or would be subject to in the future in respect to the matters herein set forth concerning the policy's character as an ocean marine insurance policy.